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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 224

FORREST G. GOOD, ET AL.,
Appellants,

vs.

THE DOW CHEMICAL COMPANY

APPEAL FROM THE COURT OF CIVIL APPEALS OF THE STATE OF TEXAS

STATEMENT AS TO JURISDICTION

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IN THE COURT OF CIVIL APPEALS
FIRST SUPREME JUDICIAL DISTRICT OF TEXAS
SITTING AT GALVESTON

No. 12,374

FORREST G. GOOD, ET AL.,
Appellants,

v.

THE DOW CHEMICAL COMPANY
Appellee

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES

STATEMENT AS TO JURISDICTION

Appellants file their statement disclosing the basis upon which they contend that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question pursuant to Rule 12 (1) of the Rules of the Supreme Court of the United States, as amended April 6, 1942.

Opinion Below

The court below wrote an opinion which is reported at 247 S. W. 2d 608. The opinion of the Court of Civil Appeals is made a part hereof, as Appendix A.

Question Presented

Does the state statute authorizing injunction, as enforced, construed and applied in this case, abridge the appellants' rights of freedom of conscience and freedom of worship, contrary to the First and Fourteenth Amendments to the Constitution of the United States?

This question was raised in the answer of the appellants filed in the trial court (Tr. 23-30).[1] It was again presented to the Court of Civil Appeals. See opinion of that court in the appendix to this statement as to jurisdiction. It was presented to the Supreme Court of Texas by petition for writ of error.

Statute Involved

This case is one in which the validity of state legislation is drawn in question, to wit: Article 4642 of the Revised Statutes of Texas, 1925, which reads as follows:

> Judges of the district and county courts shall, in term time or vacation, hear and determine applications for any may grant writs of injunction returnable to said courts in the following cases:
>
> (1) Where the applicant is entitled to the relief demanded and such relief or any part thereof requires the restraint of some act prejudicial to him.
>
> (2) Where a party does some act respecting the subject of pending litigation or threatens or is about to do some act or is procuring or suffering the same to be done in violation of the rights of the applicant when said act would tend to render judgment ineffectual.
>
> (3) Where the applicant shows himself entitled thereto under the principles of equity, and the provisions of the statutes of this State relating to the granting of injunctions.

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[1] Figures appearing herein within parentheses preceded by "Tr." refer to pages of the clerk's Transcript.

(4) Where a cloud would be put on the title of real estate being sold under an execution against a party having no interest in such real estate subject to the execution at the time of the sale, or irreparable injury to real estate or personal property is threatened, irrespective of any legal remedy at law.

Constitutional Provisions Involved

The First Amendment, relied upon in this case, reads as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The pertinent parts of the Fourteenth Amendment which appellants rely upon read as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within Its jurisdiction the equal protection of the laws.

Matters Related to Jurisdiction

Timeliness

The judgment of the Court of Civil Appeals affirming the judgment of the District Court was entered March 27, 1952. Petition for writ of error to the Supreme Court of Texas was denied on May 14, 1952. The judgment affirming the judgment of the trial court became final on May 14, 1952. This appeal is duly presented and filed within the 90-day time limit after the judgment became final. The appeal is timely.

Highest State Court

The refusal of the discretionary remedy by the Supreme Court of Texas makes the Court of Civil Appeals the highest court in Texas in this case. *San Antonio & Aransas Pass Railway Company* v. *Wagner*, 241 U. S. 476, 477.

Nature of Case

This appeal involves a suit for injunction brought by the appellee against the appellants whereby appellants' constitutional rights to meet in a public park maintained by the appellee have been denied by the permanent injunction issued by the District Court of Brazoria County, Texas, forbidding the appellants from entering the public park and holding meetings therein. The judgment granting the injunction has been affirmed by the Court of Civil Appeals and the Supreme Court of Texas has refused to review the judgment.

How Constitutional Questions Raised

The constitutional questions were raised in the answer of appellants and in the motion for judgment in the District Court of Brazoria County, Texas (Tr. 24, 26, 28, 30-34). The question presented in that court was considered and overruled (Tr. 36, S. F. 460-463).[2] The question was presented on appeal to the Court of Civil Appeals. See Appendix. The federal question presented upon this appeal also was presented to the Supreme Court of Texas by petition for writ of error.

Statutory Provisions Sustaining Jurisdiction

Jurisdiction of the Supreme Court of the United States is invoked under Section 237 of the Judicial Code or 28 U. S. C. 1257(a).

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[2] Figures appearing herein within parentheses preceded by "SF" refer to pages of the stenographer's Statement of Facts filed herein.

Under the Act of Congress of January 31, 1928, Chapter 14, 45 Stat. 54, and under the Act of Congress of April 26, 1928, Chapter 440, 45 Stat. 466, an appeal may be taken in any case which under prior statute could be received as a matter of right on writ of error. This case presents a state of facts within the jurisdiction of this Court.

Statement of Case

The Proceedings

This suit was brought by verified petition filed in the District Court of Brazoria County, Texas seeking an injunction restraining appellants from exercising their constitutional rights on the property of appellee known as Lake Jackson Picnic Grounds (Tr. 1-13). A temporary restraining order was granted (Tr. 13-17). The appellants answered, pleading estoppel and that if the injunction was granted there would be a denial of their rights to freedom of assembly, speech and worship contrary to the First and Fourteenth Amendments to the United States Constitution and Sections 6, 8 and 27 of Article I of the Constitution of Texas (Tr. 23-30).

The case was tried upon a hearing for permanent injunction pursuant to stipulation of the parties on September 20, 1951 (Tr. 34). Evidence was taken and reported (S. F. 1-528). Appellants made motions to deny the injunction and for judgment (Tr. 30-34). The motions were denied with exceptions (Tr. 36, S. F. 460-463). Judgment was entered in favor of the appellee for permanent injunction (Tr. 34-40).

The Facts

The privately owned public park in question, known as Lake Jackson Picnic Grounds, is located on The Dow Chemical Company property in Brazoria County, Texas (S. F. 4-5,

26). These picnic grounds have been improved by appellee. The grounds are thickly studded with trees, beneath which are a large barbecue pit, a large pavilion in which is a nickelodian and public telephone. Also on the grounds are a large number of picnic tables and park benches, walk ways, small individual barbecue pits, garbage receptacles and a public toilet. Also located on the grounds is a residence maintained by appellee for its caretaker (S. F. 12, 67).

The general public is invited to use the facilities of the picnic grounds except when they are reserved for the exclusive use of the appellee or for a specially designated function (S. F. 16). The people of Lake Jackson and the entire Brazos Port area of Brazoria County are invited to use the picnic grounds (S. F. 88-89). The use is not confined to employees of the appellee or members of the Lake Jackson Farm Association (113).

Appellants were allowed to hold religious meetings in the park at first (S. F. 339, 493). A series of Sunday meetings was planned (S. F. 402-403). After a few meetings were held the appellee ordered the appellants to stop holding meetings in the park (304, 314-315).

A protest to an officer of the appellee against the discrimination practiced by allowing other religious organizations to hold church meetings in the park and not allowing Jehovah's witnesses to do so was made (S. F. 304-307, 424-427). The officer declared that all other religious organizations could use the park except appellants who would be denied the use of it (S. F. 447). Appellants were the only religious group ever to be denied permission to use the park (S. F. 364).

Appellants planned to use the park over the protest of the appellee (S. F. 268). On the date appellants were to use the park special policemen, employed by the appellee, erected a road block and barrier across the road leading

into the park, forcibly kept the appellants out of the park and prevented appellants from entering the park (S. F. 177, 226-227). The barrier was put up for the specific purpose of keeping the appellants out of the park (S. F. 226, 257). The Methodist Church was permitted to have a meeting in the park on the day that appellants were excluded (S. F. 226, 235-237, 253).

Appellants planned to return to the park to hold a meeting on the following Sunday (S. F. 231-232, 451-453). On learning this the appellee obtained a temporary restraining order against the appellants.

The picnic grounds are large enough to accommodate easily 800 persons (S. F. 114). The facilities are capable of serving 400 picnicers (S. F. 291, 300). Thirty-five people—the size of appellants' meetings—would, at no time, prevent other people from enjoying the remaining facilities (S. F. 113-114, 117-119).

At all times when Jehovah's witnesses made use of the picnic grounds there was plenty of space for others because there was never more than 150 in the entire picnic grounds at such times (S. F. 437). The number was said by the Plant Protection policemen not to be too great (S. F. 146).

The undisputed evidence showed that at all times the speeches given by Jehovah's witnesses were proper. There was no undue noise or racket; there was no annoyance; there was no loud and boisterous talk. There was no vulgar or profane language and there was no improper conduct on the part of Jehovah's witnesses or the speaker (S. F. 144-146, 196). There were no threats of violence or disturbance of any kind (S. F. 436-437).

The Question Is Substantial

The practice carried on by the appellee whereby all other religious organizations are allowed to use the park and

whereby only one organization, the appellants', is denied the right to use the park for religious purposes is discrimination of the baldest kind. This practice of discrimination which has been approved by the judgment for injunction appealed from constitutes a deprivation of the rights of the appellants contrary to the equal protection of the laws clause of the Fourteenth Amendment to the United States Constitution. Permission to other religious organizations to use the picnic grounds for religious meetings and services, while refusing the same rights to Jehovah's witnesses, constitutes the deprivation of freedom of speech, freedom of assembly and freedom of worship contrary to the First and Fourteenth Amendments to the United States Constitution in violation of the equal protection of the laws.

In *Niemotko* v. *Maryland*, 340 U. S. 268, the Court said: "In this Court, it is argued that state and city officials should have the power to exclude religious groups, as such, from the use of the public parks. But that is not this case. For whatever force this contention could possibly have is lost in the light of the testimony of the Mayor at the trial that within his memory permits had always been issued for religious organizations and Sunday-school picnics." (340 U. S. at pages 272-273.)

"It thus becomes apparent that the lack of standards in the license-issuing 'practice' renders that 'practice' a prior restraint in contravention of the Fourteenth Amendment, and that the completely arbitrary and discriminatory refusal to grant the permit was a denial of equal protection. Inasmuch as the basis of the convictions was the lack of the permits, and that lack was, in turn, due to the unconstitutional defects discussed, the convictions must fall." (340 U. S. at page 273.) See also *Yick Wo* v. *Hopkins*, 118 U. S. 356, 374; *Skinner* v. *Oklahoma*, 316 U. S. 535; *Quaker City Cab Co.* v. *Pennsylvania*, 266 U. S. 390, 402.

In *Truax* v. *Corrigan*, 257 U. S. 312, 331-333, it is said: "But the framers and adopters of this (Fourteenth) amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guaranty. The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process."

The evidence is without dispute that there was such discrimination practiced. Over twenty-five different permits to religious organizations to use the picnic grounds were granted by the appellee while the same use was denied the appellants. On the first Sunday appellants used the park the Episcopalians were holding church services. The park had been reserved to the group for outdoor religious services. The preacher had an altar and was seen bowing before the cross and preaching to the congregation on the picnic grounds on June 10th.

On September 10, 1951, the day that the appellants were excluded from the picnic grounds, the Methodists were in the park, using it with permission of the appellee under the protection of its Protective Division.

The contention is made by the appellants that Article 4642 of the Revised Statutes of Texas authorizing injunctions is perfectly valid as written but has been enforced in an unconstitutional manner. In *Yick Wo* v. *Hopkins*, 118 U. S. 356, it was held that a valid ordinance had been enforced in a discriminatory and unconstitutional manner by the city officials contrary to the federal Constitution. In *Concordia Fire Insurance Company* v. *Illinois*, 292 U. S. 535, at page 545, it is said that the validity of a law depends on how it is

construed, applied and enforced. The jurisdiction of the federal courts in injunction suits has been explicitly extended to restrain perfectly valid statutes that have been enforced by administrative agents in an invalid manner. *Greene* v. *Louisville & Interurban Railroad Co.*, 244 U. S. 449, 506-508; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 390; *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20; *Louisville & Nashville Railroad Co.* v. *Greene*, 244 U. S. 522, 527, 528, 530, 531; *Sterling* v. *Constantin*, 287 U. S. 378, 393; *Fidelity & Deposit Co.* v. *Tafoya*, 270 U. S. 426, 434.

Regardless of where the title to public parks or picnic grounds may rest, the fact remains that they are, by the Constitution, held open for use as places of public assembly. In *Hague* v. *C. I. O.*, 307 U. S. 496, 515-516, the Court said:

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens."

The mere fact that the property in question is privately owned and that the regulations involved are those of a private corporation does not in any way preclude appellants from invoking the benefits of the First and Fourteenth Amendments to the United States Constitution.

It is judicial sanction to the private regulations that gives the appellants the right to invoke the federal Constitution. In *Marsh* v. *Alabama*, 326 U. S. 501 and *Tucker* v. *Texas*, 326 U. S. 517, the controversy grew out of the conflict between the proprietary rights of owners of real estate and the constitutional rights of Jehovah's witnesses. The Court, nevertheless, held that the First and Fourteenth Amend-

ments could be invoked by Jehovah's witnesses because of the judicial sanction extended by Alabama and Texas to the regulations involved in these cases.

This case is controlled by *Marsh* v. *Alabama*, 326 U. S. 501, in which Grace Marsh distributed magazines on the sidewalks of Chickasaw, a privately owned town, contrary to the wishes of the management, without a permit. She was arrested and prosecuted for trespass. A conviction was sustained by the higher courts of Alabama. It was argued that the absolute ownership and lack of dedication to the public as public property of the sidewalks and other places enabled the corporation to insist that there was a violation of its property rights amounting to trespass. The same contention was sustained by the state courts, relying upon the fact that there had been no public dedication. The Court rejected this view, saying: "We do not agree that the corporation's property interests settle the question. The State urges in effect that the corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a home-owner to regulate the conduct of his guests. We can not accept that contention. Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."

A similar ruling was made in *Tucker* v. *Texas*, 326 U. S. 517. Tucker persisted in door-to-door distribution of literature in the Hondo Navigation Village in Medina County, Texas, without a permit from the manager of the project. He was convicted of trespass when he refused to leave as ordered by the manager. "The only difference between this case and *Marsh* v. *Alabama* is that here instead of a private corporation, the federal Government owns and operates the village. This difference does not affect the

result." "It follows from what we have said that to the extent that the Texas statute was held to authorize appellant's punishment for refusing to refrain from religious activities in Hondo Village it is an invalid abridgment of the freedom of press and religion." (326 U. S. at page 520)

Watchtower Bible and Tract Society, Inc. v. *Metropolitan Life Ins. Co.*, 297 N. Y. 339, 79 N. E. 2d 433, certiorari denied 335 U. S. 886, rehearing denied 335 U. S. 912, and *Hall* v. *Virginia*, 188 Va. 72, 49 S. W. 2d 369, appeal dismissed 335 U. S. 875, rehearing denied 335 U. S. 912, are not controling. In those cases there was no open property involved. What was involved was the entry into the interior of apartment dwellings. The operators of the apartment houses in question had entered into contracts with the tenants to preserve the right of privacy of the tenants in *Watchtower Bible and Tract Society, Inc.* v. *Metropolitan Life Ins. Co., supra.* In the case of *Hall* v. *Virginia, supra*, the Attorney General of Virginia argued that Jehovah's witnesses had the right to use the Monroe Park which adjoined the Monroe Terrace Apartments. In fact Jehovah's witnesses were advertising the public meeting in the Monroe Park by distribution of leaflets when they were arrested for refusal to leave the apartments.

In *Watchtower Bible and Tract Society, Inc.* v. *Metropolitan Life Ins. Co., supra*, counsel for the Metropolitan Life Insurance Co. admitted that Jehovah's witnesses had the right to use the privately owned park located in the community notwithstanding the fact that it was privately owned.

In both of the above cases there was an invasion of the inside of a dwelling not open to the public, which distinguishes them from this case, which involves a park or picnic grounds that is open to the public although privately owned. This is a distinction that cannot be minimized.

The injunction statute, as construed and applied by the trial court and the court below so as to give sanctions to the private regulations of the appellee, like the trespass statute of Alabama in the case of *Marsh* v. *Alabama*, 326 U. S. 501, must fall because, as stated in the *Marsh* case, as construed and applied to the facts and circumstances in this case there has been a deprivation of the rights of freedom of speech, assembly and worship, contrary to the First and Fourteenth Amendments to the United States Constitution which guarantee equal protection of the law, freedom of speech, freedom of assembly and freedom of worship.

Conclusion

WHEREFORE the Supreme Court of the United States should note jurisdiction for final hearing for the purpose of determining whether or not there has been a departure by the courts below from the usual and accepted practice and which have disposed of important and substantial questions in a way that is in conflict with the Constitution of the United States and applicable decisions of the Supreme Court of the United States.

Respectfully submitted,

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APPENDIX "A"

COURT OF CIVIL APPEALS, GALVESTON, TEXAS

No. 12,374

FORREST G. GOOD, ET AL., *Appellants*,

vs.

THE DOW CHEMICAL COMPANY, *Appellee*

Appeal from the District Court of Brazoria County, Texas

This appeal by them—that is, certain individual members thereof, together with an unincorporated association called "Jehovah's Witnesses"—as Appellants, is from a permanent injunction in favor of The Dow Chemical Company, a private corporation, as appellee, granted by the 23rd District Court of Brazoria County, sitting without a jury.

The writ, in substance, permanently enjoined the appellants from entering upon and holding their "Jehovah's Witnesses" meetings therein, a certain part and "picnic grounds," established and maintained by the appellee for the social and recreational use of itself, its various departments, employees, and friends, on lands adjacent to and adjoining others of its properties around Lake Jackson, in Brazoria County, and especially what were termed its "picnic grounds" adjoining its larger tract, known as the "Lake Jackson Farms Subdivision."

Appellants' points of error here are, in substance, these:

I

"The Rules of Practice and Procedure * * *, and the Statutes of Texas, authorizing injunctions, have been construed and applied by the court below so as to bring them into conflict with the First and Fourteenth Amendments to the United States Constitution, and Sections 3, 6, 8 and 27, of the Constitution of Texas, in that the judgment * * * deprives appellants of their constitutional rights of freedom of assembly, speech and worship.

II

"The trial court failed to hold, on the undisputed evidence * * *, that the appellee was estopped to deny the appellants the right to enter the park and use it for public meetings, in that use, license, and an implied public dedication, were established as a matter of law."

Neither of these presentments, it is determined, should be sustained; upon the contrary, it is held that these two counterpoints by the appellee are fully supported by the undisputed evidence, and the law of Texas, hence that they must be sustained, to-wit:

I

"Since the undisputed evidence established that there was no express dedication of the picnic grounds, roads, and other lands to public use, and clearly negatived any intention of appellee to dedicate the picnic grounds, roads, and other lands to public use, it was therefore established as a matter of law that there has been no dedication, either express or implied, of such picnic grounds, roads, and other lands to public use. Therefore, appellants were properly enjoined from trespassing on undedicated private property.

II

"Appellants' constitutional rights of freedom of assembly, speech, and worship, do not include the privilege of exercising such rights on appellee's undedicated private property, without the consent and against the will of appellee. Accordingly, the judgment enjoining appellants from trespassing upon appellee's undedicated private property did not abridge appellants' constitutional rights."

In the first place, it is plain that—contrary to the undisputed state of the record—the appellants assume that the "picnic grounds" constituted a public park; whereas, the undisputed testimony showed that it never had been intended to be so dedicated, but that the unvarying purpose of the appellee, in its establishment and maintenance, had been, as indicated supra, to maintain these premises for the social and recreational use only of itself, its departments, and

employees, together with their friends. In further pressing their error in that respect, the appellants freely admitted upon the trial, as the statement of facts and the record undisputedly show, that—in pursuance of their insistance that the "picnic grounds" is a public park—they would continue to use those premises as a place upon which to conduct their public meetings, regardless of the appellee's wishes in that matter, unless the court should enjoin them from so doing, which its decree did.

Wherefore, it would be going beyond the requirements to follow the appellants' lead in attempting to apply either the Federal or the State law to what would have been their right to hold their meetings in a public park, where all classes were expressly invited to go; hence, their initial assumption, to quote it from their brief, that "Appellants' constitutional rights to meet in a public park maintained by the appellee have been denied by the permanent injunction issued by the District Court of Brazoria County, on September 20, 1951," is a non-sequitur.

Ramthun v. *Halfman*, 58 Tex. 551; *Oswald* v. *Grenet*, 22 Tex. 94; *International and G. N. R. Co.* v. *Cuneo*, 108 S. W. 714, writ of error refused; *Ladies' Benevolent Society* v. *Magnolia Cemetery Co.*, 288 S. W. 812; *Johnson* v. *Krieg*, 175 S. W (2d) 102, writ of error refused; *Ward* v. *Rice*, 239 S. W. (2d) 823, writ of error refused.

Since under the cited authorities and the given state of the record, it must be held that the trial court properly found not only that the picnic grounds, roads, and other lands here involved constituted undedicated private property of the appellee, it would seem to follow that the appellants had no right to enter thereon, over the protests and objections of the appellee, for the purpose of assembling and speaking, as the trial court found they had declared they would do unless it enjoined them from carrying out that determined purpose upon their part. It would seem to follow—as night the day—that any constitutional rights of the appellants to freedom of assembly, speech, and worship, have not been in anywise abridged by the trial court's injunction against them; in other words, they simply could not exercise those claimed abstract rights on the appellee's

private property, without its permission, and over its objection, since in the attempt to do so they had no higher standing than any other trespassers.

It is thought to follow also that there is no issue of constitutional law involved in this controversy as presented upon this appeal; all of the authorities cited and relied upon by appellants in their brief, under their quoted Point I, plainly involve only the issue of constitutional rights as to freedom of assembly, speech, and worship, in public parks, on public streets, or in other public places—that is, either in places which were publicly owned, or places which had been actually dedicated to public use. The large number of cases they cite upon that subject are, therefore, not material to this controversy.

In a somewhat similar case in the State of Louisiana, where some Jehovah's Witnesses claimed the constitutional right to travel down the private road of a farm, to visit and distribute their literature to tenants at their individual houses, such case being reported under the name of *State* v. *Martin*, 199 La. 39, 5 So. (2d) 377, the court said: " 'These guaranties of freedom of religious worship, and freedom of speech and of the press, do not sanction trespass in the name of freedom. We must remember that personal liberty ends where the rights of others begin.' "

See also *Hall* v. *Commonwealth*, 188 Va. 72, 49 S. E. (2d) 369; and, *Watchtower Bible and Tract Society* v. *Metropolitan Life Ins. Co.*, 297 N. Y. 339, 79 N. E. (2d) 433, 3 ALR (2d) 1423, writ of certiorari denied, 93 L. Ed. 126, 69 S. Ct. 232.

These conclusions require an affirmance of the judgment. It will be so ordered.

Affirmed.

(S.) Geo. W. Graves,
Associate Justice.

Judgment rendered, and opinion filed March 27, 1952.

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SEP 4 1952
CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 224

FORREST G. GOOD, ET AL.,
Appellants,

vs.

THE DOW CHEMICAL COMPANY

APPEAL FROM THE COURT OF CIVIL APPEALS OF THE STATE OF TEXAS

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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IN THE COURT OF CIVIL APPEALS
FIRST SUPREME JUDICIAL DISTRICT OF TEXAS
SITTING AT GALVESTON

No. 12,374

FORREST G. GOOD, ET AL.,
Appellants,
vs.
THE DOW CHEMICAL COMPANY,
Appellee

ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES

STATEMENT IN OPPOSITION TO APPELLANTS' STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

The Appellee in the above entitled cause for its statement in opposition to Appellants' statement as to jurisdiction herein, and in support of Appellee's motion to dismiss or affirm, respectfully shows the following:

I

Statement of Issue on Appeal

The only issue presented by the appeal is whether Appellants have constitutionally guaranteed rights to enter upon, assemble upon and make addresses upon Appellee's undedicated private property without the consent and over the protests and objections of Appellee.

II

The Facts

The Lake Jackson picnic grounds belong to Appellee and have never been dedicated to public use by either express or implied dedication. Appellee bought, improved and maintains the picnic grounds, paying for taxes, insurance, roads, policing, caretaking, maintenance and repairs. (See S. F. 3-22, 273-277, 325-326, 332-336, 383, 485-498, Plaintiff's Exhibits 9 and 10). The Appellee established and maintains these picnic grounds for the social and recreational use of the company, its various departments, its employees and their friends. The Appellee has always maintained, reserved, and exercised the absolute right to grant or deny use of the picnic grounds as, in its discretion, it sees fit; to reserve exclusive use of the picnic grounds for itself or to any group or organization granted exclusive use thereof for a particular occasion; and to exclude any groups or individuals from use of the picnic grounds when it sees fit. (See S. F. 13-19, 95-104, 132-133, 336-337.) Families and individuals have been permitted to use the picnic grounds, to have picnics without formal permits, but large groups and all organized groups, such as churches and clubs, have been required to procure formal written permits before using the picnic grounds. (See S.F. 14-16, 68-80, 95-97, 326, 328, 338-341, 356-363, 366-369, 375-378, 381.)

The land in question is located in the open countryside some two or three miles from the town of Lake Jackson. The only entry to the land is through a cattle guard entry way on the Appellee's private road. At this cattle guard entrance there is a large sign placed there by Appellee approximately ten years ago, reading: "Posted. No Trespassing. Hunting, Fishing, Shooting, Prohibited." (See S. F. 5-7, 10-11, Plaintiff's Exhibits 1 and 3). This fenced-in road continues for several hundred yards through cattle lands to a bridge over Appellee's fresh water canal. The

fresh water canal bridge leads to a private road of Appellee which turns to the left beyond the bridge and leads on to the picnic grounds in question. The picnic grounds cannot be reached in any other manner. (See S. F. 7-10, Plaintiff's Exhibit 3, 97-99).

The Lake Jackson picnic grounds and the roads and lands in question are not located within any town or city. There are no stores, business establishments, schools, churches, or other structures evidencing the existence of any kind of town in the area where the picnic grounds are located. The picnic grounds are simply a timber tract of land adjoining a body of water known as Lake Jackson. Beyond the picnic grounds there are a number of private residences located on tracts of land out of the Lake Jackson Farms Subdivision sold by Appellee to its employees. (See S.F. 62-66, 106-110, 277, 289-290.)

The City of Lake Jackson, the corporate limits of which are located between two and three miles from the picnic grounds and the road in issue, is not a company-owned town. It is a legal, municipal corporation under the laws of the State of Texas, having an elected mayor and city council, an office for the city government, public streets and public schools, and other public facilities. It levies and collects taxes to maintain its public streets and to carry on its other municipal functions. It has the general run of various types of business houses in addition to its residential area. There are many property owners in the city of Lake Jackson other than Appellee. Furthermore, there is a dedicated public park containing 22 acres of land located in the city of Lake Jackson and readily accessible to and used by its residents. (See S.F. 271-273, 279-287, Defendants' Exhibit 18, 383-385.)

Appellants, who are all members of a religious group known as Jehovah's Witnesses, persistently and repeatedly entered Appellee's private roads and picnic grounds and conducted public meetings thereon without Appellee's per-

mission and over the express protests and objections of Appellee. (See S. F. 140-145, 157-161, 170-177, 217-233, 268-271, 288-329, 393-398, 441-454, 483-484, Plaintiff's Exhibits 7 and 8.) Appellants, even at the hearing on the application for permanent injunction, expressed a fixed intention and determination to continue trespassing on Appellee's property unless they were enjoined from doing so. (See S.F. 448-453).

III

No Substantial Federal Question Is Presented by the Appeal

This is not a constitutional law case. The only issue there has ever been in the case is whether the picnic grounds have been impliedly dedicated to public use or whether facts "equal to such dedication" exist. The facts and the law of Texas are so overwhelmingly against Appellants on this issue that the issue has long since been abandoned by them. They now contend, in effect, that they have constitutionally guaranteed rights to enter upon, assemble upon and speak upon the Appellee's private, non-dedicated picnic grounds even though no dedication to public use and no facts "equal to such dedication" exist.

Appellants seek to invoke *Niemotko* v. *Maryland,* 340 U. S. 268, and *Hague* v. *C. I. O.,* 307 U. S. 496. The *Niemotko* case and the *Hague* case are *public park* cases. They do not govern here. This is a *private* picnic ground case. The *Niemotko* case involved only the prohibiting of a public assembly and public address in a municipally-owned public park in Havre de Grace, Maryland, and the *Hague* case involved only the prohibiting of public meetings and public addresses on the municipally owned public streets and public parks of Jersey City—all dedicated to public use.

Appellants' real effort is to secure an extreme extension of the doctrine of *Marsh* v. *Alabama,* 326 U. S. 501, and *Tucker* v. *Texas,* 326 U. S. 517. The *Marsh* and *Tucker*

cases are not controlling here. The United States Supreme Court in those cases considered that the facts were *equal to dedication.* The court later so stated in *Breard* v. *City of Alexandria,* 341 U. S. 622, 71 S. Ct. 920, 95 L. Ed. 1233, in which the court stated at 341 U. S. 643, 95 L. Ed. 1248: "In the Marsh Case it was a private corporation, in the Tucker Case, the United States, that owned the property used as permissive passways in company and government-owned towns. In neither case was there dedication to public use but *it seems fair to say that the permissive use of the ways was considered equal to such dedication.*" (Italics ours.)

The facts in this case do not establish a case "equal to such dedication". There is no company-owned town with all of the characteristics of an ordinary American town involved. There is involved a private picnic grounds on fenced-in, enclosed, undedicated, private lands located in a rural area several miles from the nearest town and accessible only by travel across cattle guards over private roads.

The controlling cases are *Watchtower Bible and Tract Society, Inc.* v. *Metropolitan Life Ins. Co.,* 297 N. Y. 339, 79 N.E. 2d 433, certiorari denied 335 U. S. 886, rehearing denied 335 U. S. 912, and *Hall* v. *Virginia,* 188 Va. 72, 49 S.E. 2d 369, appeal dismissed 335 U. S. 875, rehearing denied 335 U. S. 912. In each of these cases Jehovah's Witnesses sought to extend the doctrine of the *Marsh* and *Tucker* cases to undedicated private property—the enclosed hallways and inner-areas of apartment houses. The United States Supreme Court refused so to extend the doctrine.

The case at bar is but another attempt by Jehovah's Witnesses to pierce the constitutional right of privacy in the peaceful enjoyment and possession of undedicated private property with a constitutional privilege of trespass in the name of freedom of religion. It is but another attempt to stretch and extend the *Marsh* and *Tucker* cases from public land—dedicated or "equal to such dedication"—to un-

dedicated private lands. The Appellants cannot bridge this chasm. The United States Supreme Court closed the door on such an invasion of private property by its action in the *Hall* case and the *Metropolitan Life Insurance Company* case. It made it clear in *Breard* v. *Alexandria* that the court had not intended to leave any such door ajar in the *Marsh* and *Tucker* cases. If the *Marsh* and *Tucker* cases could be originally construed as leaving such a door ajar, the door has definitely been closed by *Hall* v. *Commonwealth*, the *Metropolitan Life Insurance Company*, and *Breard* v. *Alexandria*. In the *Hall* case and the *Metropolitan* case the United States Supreme Court refused to permit the very creeping encroachment which is again sought in the case at bar. The appeal presents no substantial Federal question.

WHEREFORE, Appellee moves that the within appeal be dismissed or that the judgment and decree of the Court of Civil Appeals for the First Supreme Judicial District of Texas be affirmed.

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No. 134

FILED
JUN 16 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

THE GOODYEAR TIRE & RUBBER COMPANY, INC.,
Petitioner,

vs.

JAMES TIERNEY, RUSSELL SMITH, BEN EMGE, GEORGE HALPIN, JOHN J. KEELEY, Members, and JOHN J. COSTELLO, Chief Clerk of the St. Clair County Board of Assessors; HERBERT SCHWIND, E. A. CUNNINGHAM and JOHN B. SIMONDS, Members of the St. Clair County Board of Review; MORRISON C. TREESH, Former Town Collector for Canteen Township; LARRY RECKLEIN, Present Town Collector for Canteen Township, and CHARLES J. SCHMULBACH, County Collector for St. Clair County,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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IN THE

SUPREME COURT OF THE UNITED STATES.

THE GOODYEAR TIRE & RUBBER COMPANY, INC.,
Petitioner,

vs.

JAMES TIERNEY, RUSSELL SMITH, BEN EMGE, GEORGE HALPIN, JOHN J. KEELEY, Members, and JOHN J. COSTELLO, Chief Clerk of the St. Clair County Board of Assessors; HERBERT SCHWIND, E. A. CUNNINGHAM and JOHN B. SIMONDS, Members of the St. Clair County Board of Review; MORRISON C. TREESH, Former Town Collector for Canteen Township; LARRY RECKLEIN, Present Town Collector for Canteen Township, and CHARLES J. SCHMULBACH, County Collector for St. Clair County,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINIOS.

Petitioner, Goodyear Tire & Rubber Company, Inc., hereinafter referred to as Goodyear, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois entered in the above entitled case on March 17, 1952.

OPINION BELOW.

The opinion of the Supreme Court of Illinois is reported in 411 Ill. 421, 104 N. E. 2d 222.

JURISDICTION.

The opinion of the Supreme Court of Illinois in this case was handed down on January 24, 1952 (R.19..),[1] and thereafter on March 17, 1952, Goodyear's petition for a rehearing was overruled (R.31..). The jurisdiction of this court is invoked under 28 U. S. C., Sec. 1257 (3) (June 25, 1948, c. 646, 62 Stat. 929, and 28 U. S. C., Sec. 2101 (1) (June 25, 1948, c. 646, 62 Stat. 961).

QUESTION PRESENTED.

Where land owned by the United States of America is occupied by a private corporation as a tenant at will, may the state in which that land is located assess the entire value of the freehold against that private corporation and tax that corporation on the entire value so assessed, without depriving the corporation of due process of law under the Fourteenth Amendment?

STATUTES INVOLVED.

The statutes involved in this case are **Smith-Hurd Ann. Stat.**, Ch. 120, Sec. 507 and **Smith-Hurd Ann. Stat.**, Ch. 120, Sec. 501 (2). Smith-Hurd Ann. Stat., Ch. 120, Sec. 507, reads as follows:

> "When real estate which is exempt from taxation is leased to another whose property is not exempt, and the leasing of which does not make the real estate taxable, the leasehold estate and the appurtenances shall be listed as the property of the lessee thereof, or his assignee, as real estate."

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1 "R." refers to the record printed by the clerk of this court and "Abstr. of Record" refers to the record filed in the Supreme Court of Illinois.

Smith-Hurd Ann. Stat., Ch. 120, Sec. 501, reads in part, as follows:

> "(2) Each taxable leasehold estate shall be valued at its fair cash value, estimated at the price it would bring at a fair, voluntary sale."

STATEMENT.

On or about February 1, 1947, petitioner, Goodyear Tire & Rubber Company, Inc., hereinafter called Goodyear, entered into possession and occupancy of certain improved real estate located in St. Clair County, Illinois, which was owned by the United States of America (Abstr. of Record, p. 3).

Goodyear occupied the premises under an "interim permit" from the United States and was at most a tenant at will. The permit contemplated that Goodyear and the United States would execute a lease at some future date. It provided for an annual rental of $79,095.70 and granted Goodyear an option to purchase for $829,729.50 (Abstr. of Record, pp. 14-15). However, the contemplated lease was never executed and Goodyear surrendered possession of the premises on July 31, 1948 (Abstr. of Record, p. 13).

The Board of Assessors of St. Clair County, Illinois, at a meeting with a representative of Goodyear took the position that the occupancy of said property of the United States of America by Goodyear made the property taxable to Goodyear and that the value of the entire freehold interest—the interest of both Goodyear and the United States of America—was taxable to Goodyear (Abstr. of Record, pp. 4, 7, 10-13). Accordingly, the freehold was assessed in the name of Goodyear and the assessment was $884,940 in 1947 and $915,470 in 1948 (Abstr. of Record, p. 3). Based on these assessments a tax bill for $24,265.14 was sent to

Goodyear for 1947 and a tax bill for $27,324.14 was sent for 1948 (Abstr. of Record, p. 4).

Goodyear instituted this action for a declaratory judgment alleging in its petition that the assessments were void:

> "* * * and any attempt to collect these taxes will be an attempt to take the petitioner's property without due process of law in violation of Article 2, Section 2 of the * * * Fourteenth Amendment of the Constitution of the United States" (Abstr. of Record, p. 4).

Goodyear's petition for a declaratory judgment was dismissed by the trial court on the ground that "plaintiff had not exhausted all of its statutory legal remedies" (Abstr. of Record, p. 9).

In both the trial court and this court plaintiff contended that it need not exhaust its statutory remedies because such remedies need not be exhausted in any case where the tax is on property exempt from taxation—in this case the freehold interest of the United States of America which was taxed in its entirety to Goodyear. Rejecting this contention the court said:

> "* * * An assessment to appellant based on the value of the freehold could be said to be an erroneous and excessive assessment but it is not tantamount to an attempt to tax exempt property. The property was exempt from taxation only in the hands of the United States Government and not in the hands of the lessees. However erroneous the action of the assessors may have been in assessing the interest of the Goodyear Company by valuing it at the full value of the fee any objection to their action goes only to the amount of the assessment and affords appellant no basis for a claim to exemption" (R2S., 104 N. E. 2d 225).

In basing its decision on this ground the Supreme Court of Illinois ignored the constitutional question raised by Goodyear and stated as follows in its brief filed with that court:

> "If Smith-Hurd Ann. Stat., Ch. 120, Secs. 507 and 501 (2), are construed so as to make the value of the freehold taxable to plaintiff they would violate the Fourteenth Amendment of the United States Constitution * * *." (Appellant's Brief, p. 13.) [Certified as part of record but by stipulation not printed.]

The constitutional question was again urged by Goodyear in its motion for rehearing in the following language:

> "To tax a Lessee of Real Estate owned by the United States on the Value of the Freehold Interest Violates the 14th Amendment of the United States Constitution." (Motion for Rehearing, p. 7, Certified as part of record but not printed by stipulation.)

SPECIFICATION OF ERRORS TO BE URGED.

The Supreme Court of Illinois erred:

1. In refusing and failing to hold that the Board of Assessors of St. Clair County, Illinois, in assessing the entire value of the freehold of land owned by the United States of America and occupied by Goodyear, a private corporation, as a tenant-at-will, against Goodyear, deprived Goodyear of due process of law under the Fourteenth Amendment of the Constitution of the United States.

2. In denying Goodyear's constitutional rights by basing its opinion on the non-Federal ground of decision that Goodyear had failed to exhaust its statutory remedies which ground is without any substantial basis.

REASONS FOR GRANTING THE WRIT.

The decision of the Supreme Court of Illinois in this case is not in accord with the applicable decisions of this Court. It is in direct conflict with, among others, the decisions of this Court in **United States v. County of Allegheny**, 322 U. S. 174, 88 L. Ed. 1209, 64 S. Ct. 908 (1944) and **Van Bocklin v. Anderson**, 117 U. S. 151, 49 L. Ed. 845, 6 S. Ct. 670 (1886).

The assessment in this case could properly have been only levied against Goodyear's interest in the property in question. It could not have lawfully been on the freehold interest of the United States of America—an interest exempt from taxation.

United States v. County of Allegheny, supra, is squarely in point. In that case Pennsylvania had levied a tax on the Mesta Machine Company plant based on its value as increased by machinery owned by the United States and leased to the company for the manufacture of guns for the Army. The taxing authorities and the Supreme Court of Pennsylvania held that the tax was on the interest of Mesta and was not a tax on the exempt property of the United States of America in the following language (l. c. 1216):

> "• • • It acknowledged that property held by the United States is 'beyond the pale of taxation' by a state, but this assessment, it said, is not against the United States but against Mesta, which is operating its mill for private purposes. If Mesta defaulted in tax payments, the court held that the 'paramount rights of the Government in the machinery could not be divested or in any way affected' hence the Government could suffer no loss."

This Court, while indicating that Mesta's interest might have been taxable as such, held that the tax in question was a tax on property owned by the United States and which was therefore exempt from taxation. This Court said (l. c. 218):

> "**We hold that the substance of this procedure is to lay an ad valorem general property tax on property owned by the United States.**" (Emphasis supplied.)

This Court also said (l. c. 1219):

> "Mesta has some legal and beneficial interest in this property. It is a bailee for mutual benefit. Whether such a right of possession and use in view of all the circumstances could be taxed by appropriate proceedings we do not decide. Its leasehold interest is subject to some qualification of the right to use the property except for gun manufacture, is limited to the period it engages in such work, and is perhaps burdened by other contractual conditions. * * * But that is not the situation here, and **the State has made no effort to segregate Mesta's interest and tax it.** The full value of the property, including the whole ownership interest, as well as whatever value proper appraisal might attribute to the leasehold was included in Mesta's assessment." (Emphasis supplied.)

Van Bocklin v. Anderson, 117 U. S. 151, 29 L. Ed. 845, 6 S. Ct. 670 (1886), is likewise squarely in point. In that case the United States had purchased certain land at a tax sale which land was thereafter redeemed by the former owner. The state contended that the former owner was liable for tax during the years the United States held title to the property. This Court said (l. c. 180):

> "The question whether the taxes laid under authority of the State can be collected in this suit depends upon the question whether they were lawfully as-

to the right or to bar the assertion even upon local grounds. * * *"

In **Young v. Ragen**, 337 U. S. 235, 93 L. Ed. 1933, 69 S. Ct. 1073 (1948), this Court of the United States had this to say:

"* * * But it is not simply a question of state procedure when a state court of last resort closes the door to any consideration of a claim of denial of a Federal right and that is the effect of the denials of habeas corpus in a number of cases now before this Court. * * *"

In this case the Illinois courts have violated the foregoing pronouncements of the Supreme Court of the United States and have denied Goodyear a Federal right.

Prior to the decision in this case, the Illinois statutes set out hereinabove [**Smith-Hurd Ann. Stat.**, Ch. 120, Sec. 507, and **Smith-Hurd Ann. Stat.**, Ch. 120, Sec. 501 (2)], had been construed by Illinois courts to make only the leasehold interest of the lessee taxable and they did not make the freehold interest in property owed by the United States of America taxable to the occupant. This is illustrated by a consideration of **LaSalle Manufacturing Company v. City of Ottawa**, 16 Ill. 416 (1855), where a judgment for delinquent taxes was rendered against the lessee of certain real estate which was exempt from taxation. The judgment described the property in such terms that the taxing authorities could sell the entire lot. The court pointed out that the assessment should have been only upon the leasehold. The court said (l. c. 421):

"The terms and phraseology of this judgment are too general and too broad. The assessment was upon the leasehold estate in this lot. The judgment should have described the same estate or interest. By its

terms, however, it imports and describes the whole estate or land. For this error, the judgment will be reversed and the cause remanded, to enable the county court to correct the entry, by describing in the judgment, the true estate or interest condemned, and ordered to be sold."

Before this case was decided the Illinois courts recognized that several interests may be created in real estate and that each of those interests may be treated as real estate and taxed separately. This was especially true of a leasehold interest which is personalty—a chattel real.

In **City of Chicago v. University of Chicago**, 302 Ill. 455, 134 N. E. 723 (1922), the rule was stated as follows:

> "* * * Although by virtue of the common law a lease-hold remains a chattel real, it was within the power of the state to declare its nature contrary to the common law for the purposes of taxation. * * *"

In this case Goodyear has never conceded—much less contended—that the case was merely one of excessive valuation. On the contrary, Goodyear's consistent contention has been that it was being taxed on an interest in real estate which it did not own and an interest which was exempt from taxation.

The Illinois Supreme Court recognized the principle that Goodyear need not exhaust its statutory remedies before instituting this action if the tax was on property exempt from taxation. However, that Court fell into error and deprived Goodyear of its constitutional rights when it held that this assessment was not on property exempt from taxation. The foregoing statutes and cases show that the occupancy by Goodyear did not make the freehold interest owned by the United States of America taxable. The

court's statement that the property was exempt from taxation only in the hands of the United States Government completely overlooks the cases heretofore discussed.

CONCLUSION.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

Charles M. Spence

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CHARLES M. SPENCE,

.....

HAROLD I. ELBERT,

.....

WESLEY LUEDERS,
Counsel for Petitioner.

Dated this 13th day of June, 1952.

IN THE

Supreme Court of the United States

October Term, 1952 No.

MORRIS GORDON,

Petitioner,

vs.

MIRIAM GORDON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Morris Gordon, the petitioner herein, prays that a writ of certorari be issued to review the final decree of the Supreme Court of the State of Florida affirming the decree of the Circuit Court of Dade County, Florida, granting a divorce to the respondent herein.

SUMMARY STATEMENT OF THE FACTS

This petition relates to a writ of certiorari to review the decree of the Supreme Court of Florida filed on May 2, 1952.

This case had previously been considered by the Supreme Court of Florida. There is no substantial dispute as to the facts, but only as to the conclusions of law resulting therefrom. The case involves the question as to whether or not the Florida Courts accorded to a final judgment of a Pennsylvania Court the full faith and credit guaranteed that Pennsylvania judgment by the Constitution of the United States.

An important reason for the grant of a writ of certiorari to review a case decided by a State Court is a lack of uniformity in State Courts regarding the full faith and credit to be accorded the final decree of a State Court by the Courts of sister states. That there is a lack of uniformity in state courts regarding the questions presented in this case is clearly shown by that portion of the opinion of the Supreme Court of Florida, quoted at page 19 of this petition, under the reasons for granting a writ in this case.

The following facts (except those in parenthesis) are shown in the opinion on the first appeal in this case as reported in 4 A.L.R. 2d at page 104. Respondent instituted an action for divorce in Pennsylvania on the ground of indignities to her person. Petitioner appeared and filed an answer. While the case was pending, the respondent went to Florida and there instituted a suit for divorce, charging petitioner with extreme cruelty and desertion. A special master was appointed in the Florida case and testimony was taken. Subsequently, respondent moved in the Pennsylvania suit for leave to discontinue that case. The Pennsylvania Court refused to permit her to discontinue it. Upon the petitioner's motion, the Pennsylvania Court appointed a Master who proceeded to take testimony. At the hearing in Pennsylvania, the respondent did not appear nor was she represented by Counsel, although she had notice of the hearing and had ample opportunity to attend and offer testimony. After taking testimony the Master in the Pennsylvania case recommended that respondent's

Pennsylvania action be dismissed because the charges were unproved. The petitioner offered voluminous testimony. (Among other things, the master in the Pennsylvania case found that the respondent was not domiciled in Florida, but that she was a resident of Pennsylvania at the time of the hearing, which was many months after she had filed her action in Florida. (R 222-218). The parties were residents of Pennsylvania at the time of the marriage; they were married in Pennsylvania; and they lived in Pennsylvania until the respondent refused to live with her husband and separated from him. (R 134). The respondent claimed in the Florida action that she left her husband because of his treatment of her.) The petitioner offered evidence and testified regarding his conduct, in the Pennsylvania Court hearing, and the Pennsylvania Court held by final judgment that the conduct of the petitioner did not warrant a decree on the ground of indignities to the person.

The petitioner had filed an answer in the Florida case and that case came to hearing about the same time as the Pennsylvania case. The special master recommended a divorce on the ground of extreme cruelty, but held that the testimony failed to prove desertion. After the Pennsylvania action had been dismissed by the final judgment of the Pennsylvania Court, the petitioner moved to dismiss the Florida suit claiming that the dismissal of the Pennsylvania action operated as res judicata and was therefore entitled to full faith and credit in the Florida court. He was permitted to amend his answer to set up the Pennsylvania judgment as a bar to the respondent's action in the Florida Court. Subsequently, the Circuit Court in Florida denied the petitioner's motion to dismiss the respondent's suit there, and struck from the answer the amedment which included the record of the Pennsylvania case and judgment. The circuit Court for Dade County, Florida, then granted the respondent an absolute divorce.

From that decree, the petitioner appealed to the Supreme Court of Florida and that court reversed the cause and remanded the case for further proceedings.

We believe that the questions involved can be presented most clearly by adopting the following statements from the opinion of the Supreme Court of Florida now under review and by stating certain undisputed facts which appear in the transcript of the record on the second appeal to the Supreme Court of Florida. With this purpose in view, we quote from the opinion (R 770): "This is the second appearance of the instant suit in this Court. The citation of our opinion on the prior appeal is 160 Fla. 838, 36 So. 2d 774, 4 A.L.R. 2d 102. On the former appeal we reversed the decree of divorce which was entered in favor of Miriam Gordon." • • • • •

The Court continues (R 772): "It was our opinion and judgment upon the first appearance of the instant suit in this Court that the Pennsylvania Court's final decree should have been given full faith and credit because we determined that both suits were predicated upon the same cause of action after concluding that the testimony which was presented by the appellee in her Florida suit was "essentially the same as that which she would have been required to present to establish her charge of 'indignities to the person', had she pursued her action in Pennsylvania where she was given ample notice and opportunity to be heard.

Upon remand to the Circuit Court appellee amended her bill of complaint. In and by her amendment she reiterated her charge of extreme cruelty and elaborated thereon. She also reasserted that the appellant had been guilty of desertion which she contends was constructive in character.

The final decree from which this appeal is prosecuted granted unto Miriam Gordon a decree of divorce a vinculo matrimonii. In and by said decree it was determined Miriam Gordon had established that her husband was guilty

of desertion and of extreme cruelty which was expressly declared to have been of a physical nature.

It was the Chancellor's view that full faith and credit need not now be given to the final decree of the Pennsylvania court. It was his opinion that the evidence which was produced by the appellee established extreme cruelty of a physical nature and that her action in Pennsylvania was not based upon a ground which contemplated physical cruelty. He further reached the conclusion that appellee's suit in this State was not foreclosed by the final decree of the Pennsylvania court because appellee did not in that court assert desertion as a ground for divorce. Moreover the Chancellor followed the suggestion of counsel to the effect that she could not have charged desertion at the time she filed her action in Pennsylvania under the law of that State because the Pennsylvania statute required desertion for a period of two years and such period had not then run." • • •

The Court then considered the testimony in the case and first disposed of the question involved in the grant of a divorce to the wife on the ground of extreme cruelty, making the following statement (R 780): "It may be that appellee's evidence made a prima facie case for a final decree of divorce upon the ground of extreme cruelty but the character of such cruelty must be classified as mental. However, it is improper for us to decide whether such evidence could be said to establish extreme cruelty of a mental character sufficient to justify a final decree of divorce because we are compelled again to hold that full faith and credit should have been given to the final decree of the Pennsylvania court, insofar as the cause of action in the instant suit was founded upon extreme cruelty, and that court decided said question adverse to appellee. The relief sought by appellee upon the ground ofextreme cruelty should have been denied because the allegations of the amended bill and the proof in support thereof failed to establish extreme

cruelty of a physical nature, and extreme cruelty of a mental character was foreclosed by the final decree in the Pennsylvania suit." * * * * *

The Court then considered the effect of the final judgment in the Pennsylvania case and the credit to be given to that final judgment in the Florida Courts insofar as the granting of a divorce on the ground of desertion is concerned. As to that cause for divorce, the Supreme Court of Florida held that the final decree of divorce granted respondent upon the ground of desertion should be affirmed (R 787). The respondent did not contend that petitioner had left her, but on the contrary that petitioneer's course of conduct caused her life with him to be so burdensome as to require her, in the interest of her health and peace of mind, to leave the petitioner. This constitutes what is commonly called "constructive desertion" (R 781).

The petitioner contended that his conduct toward his wife had been conclusively adjudicated by the final decree of the Pennsylvania Court and that the final judgment was res judicata with respect to the petitioner's conduct toward his wife. He contended that the full faith and credit clause of the Federal Constitution demanded that the Florida Courts give full faith and credit to that final decree of the Pennsylvania Court, which thus became a bar to the respondent's claim that the conduct of her husband was such as to justify her in leaving her husband. That action commenced the constructive desertion upon which the divorce decree was affirmed by the Supreme Court of Florida. That Court held that none of the issues presented in this case, insofar as it is predictated upon "constructive" desertion is concerned, was adjudicated in the Pennsylvania action, nor were the issues ones proper to have been adjucitated in the Pennsylvania litigation (R 783). The Court held that respondent could not have charged her husband with desertion in the Pennsylvania action because the desertion

had not existed for two years or more (R 783). The Court stated that the facts relied upon by the respondent in her Pennsylvania suit in which she sought an absolute divorce on the ground of indignities to her person would have been essentially the same had she appeared and testified, as the facts which she presented in the Florida action (R 784). Petitioner contended that since the facts were essentially the same, the final decree of the Pennsylvania Court was res judicata and therefore a bar to the granting of a divorce by the Florida Courts. Notwithstanding that the facts were essentially the same as respondent would have been compelled to prove in the Pennsylvania action, the Supreme Court of Florida held that the final judgment of the Pennsylvania Court did not operate as res adjudicata upon the final decree of divorce granted upon the ground of desertion because the points and questions actually litigated and determined were not the same in both actions (R 787). To arrive at that conclusion, the Florida Court adopted the following reasoning: While it is true that the facts relied upon by respondent in her Pennsylvania suit on the ground of indignities to the person would have been essentially the same as the facts she presented in the Florida action, the degree of proof necessary to entitle her to a final decree of divorce upon the ground of indignities to the person in the Pennsylvania action was greater than the degree of proof required to establish that she was justified in temporarily separating from her husband under the law of the State of Florida, and that therefore, neither estoppel by judgment nor res adjudicata forms a basis for invocation of the full faith and credit clause of the Federal Constitution (R 784).

The final decree of the Supreme Court of Florida granting respondent a divorce upon the ground of desertion is thus based upon the action of the Florida Court in construing the effect of the final judgment of the Pennsylvania Court insofar as the Supreme Court of Florida based its opinion upon the degree of proof required in Pennsylvania,

to entitle a litigant to a final decree of divorce upon the ground of indignities to the person.

The Florida Court had knowledge of the degree of proof required under the laws of the State of Florida to justify a wife in temporarily separating from her husband and thus to begin the period of "constructive" desertion. The Supreme Court of Florida failed to give full faith and credit to the final judgment of the Pennsylvania Court when it attempted to define the degree of proof required in Pennsylvania to entitle a litigant to a final decree of divorce upon the ground of indignities to the person. The law of Pennsylvania was in evidence upon the trial; there was no contradiction of it; and it showed that there is no general rule under the law of Pennsylvania as to the degree of proof required to sustain a decree of divorce upon the ground of indignities to the person. (R456)

The fact that there is no general rule in Pennsylvania regarding the matter is sustained by many decisions of the Superior Court of Pennsylvania, copies of opinions in which were in evidence in this case. The numerous decisions of the Superior Court of Pennsylvania sustain the proposition as stated in the opinion of the Superior Court of Pennsylvania, in the case of BOCK V. BOCK, reported in 162 Pa. Superior Ct. at page 506, from which we quote as follows (R 456): "As stated by Judge Rhodes in Monaco V. Monaco, 160 Pa. Superior Ct. 117, at page 118, 50 A. 2d 520, at page 521: "We have repeatedly said that it is impossible to lay down a general rule for the determination of what indignities render the condition of the injured party intolerable and his life burdensome. Hahn v. Hahn, 135 Pa. Superior Ct. 39, 41, 4 A. 2d 821. The circumstances of each case must largely determine whether the acts charged amount to such indignities as will justify the court in making a decree of divorce. * * * "

Similar statements in other opinions are contained in the record at pages 336, 384, 391, 424, 431, and 465.

In the Florida action petitioner raised the question of residence and domicile of the respondent, denying in his answer that respondent had been a resident of Florida for for more than 90 days prior to the filing of her bill of complaint. He averred on the contrary, that her bona fide legal residence on June 28, 1947, and prior thereto, was in Pennsylvania (R 89). He denied that he was guilty of desertion and everred on the contrary that respondent had deserted him in Pennsylvania (R 105).

The master in the Pennsylvania case had considered the question of residence and domicile and on the basis of the facts presented, found that the respondent was domiciled in Pennsylvania and not domiciled in the State of Florida on May 27, 1947, the date of the hearing in Pennsylvania (R 222, 218). On June 28, 1947, the findings of fact, conclusions of law, and recommendation of the master were adopted by the Pennsylvania Court and the libel was dismissed at her costs (R 230). Respondent had filed her action in the Florida case on September 30, 1946 (R 8).

The respondent voluntarily selected the Pennsylvania Court as the Court to try her action for divorce from her husband by filing a libel in the Pennsylvania Court on January 18, 1946 (R 8). She actively participated in the action in that Court when on May 5, 1947, she filed her petition for leave to discontinue her action, which leave was not granted (R 8-9). She was given ample notice and opportunity to be heard in the Pennsylvania action (R 13).

The petitioner had constantly raised the question of the residence of respondent in the case before the Circuit Court for Dade County, Florida, and also upon appeal to the Su-

preme Court of Florida[1], (See Note). The question as to whether the respondent was in fact a resident of Pennsylvania or a resident of Florida at the time she filed her action in Flordia and for 90 days prior thereto was not discussed by the Supreme Court of Florida in its opinion which was filed on May 2, 1952 (R 770).

Under the rules of practice in the Supreme Court of Florida, petitioner, within fifteen days after the filing of said opinion, petitioned the Supreme Court of Florida for rehearing, raising the questions now presented upon this petition, and specifically raising the question of residence of respondent (R 799, 800), and the fact that the conduct of the husband insofar as it would justify his wife in leaving him had been finally adjudicated by the final decree of the Pennsylvania Court (R 798).

The Supreme Court of Florida denied the petition for rehearing on the 21st day of May, 1952. (R 803).

NOTE 1:

That question was raised as follows:

In petitioner's objections to respondent's motion for leave to file amended Bill of Complaint (R 41).

In petitioner's motion to strike parts of respondent's response (R 43-46).

In petitioner's motion to strike parts of Amended Bill of Complaint (R 70).

In petitioner's motion to dismiss Amended Bill of Complaint (R 82).

In petitioner's answer to Amended Bill of Complaint (R 89).

In petitioner's contention before the Special Master (R 486).

In the 11th Exception to the Report of the Special Master (R 506).

In the 8th Assignment of Error (R 549).

JURISDICTION

1. Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257, which provides, in part:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: * * * * *

"(3) By writ of certiorari, **** where any title, right, privilege or immunity is specially set up or claimed under the Constitution, * * * *"

2. It is contended that the Supreme Court of the State of Florida did not give to the final judgment of a Pennsylvania Court of record, the full faith and credit to which the judgment of the Pennsylvania Court was entitled under the full faith and credit clause of the Federal Constitution, and therefore it is believed that the following cases sustain the jurisdiction of this Court:

Titus v. Wallick, 306 U. S. 282, 83 L. Ed. 653.

Supreme Council of Royal Arcanum v. Green, 237 U. S. 531, 59 L. Ed. 1089.

Sutton v. Leib, 342 U. S. 402, 72 S. Ct. 398, and cases therein cited including those cited in the notes stated in the report of that case.

3. The Supreme Court of Florida is the highest court of the State.

4. The judgment of which review is sought is a final judgment of the Supreme Court of Florida (R 789).

5. The judgment herein sought to be reviewed was filed on May 2, 1952 (R 788).

The Supreme Court of Florida denied a petition for rehearing in said case on the 21st day of May, 1952 (R 803).

6. The federal question of substance which has been decided by the Supreme Court of Florida is that, while the final decision of the Pennsylvania Court is entitled to full faith and credit under the Constitution and laws of the United States, that Pennsylvania judgment entered in an action instituted in Pennsylvania by the respondent, before she instituted her action in the sister state of Florida, was not res adjudicata in the subsequent divorce action in Florida, even though the parties were identical and the wife had instituted the action in each court, and thereby, voluntarily appeared in the Pennsylvania Court, and also in the Florida Court.

The decision of the Supreme Court of Florida denies to the final judgment of the Pennsylvania Court the full faith and credit guaranteed by the Constitution of the United States. The Supreme Court of Florida recognizes the fact that full faith and credit must be accorded judgments of a court of a sister state. In the first appeal the Court enforced the correct rule as to the requirements of the full faith and credit clause of the Federal Constitution. Upon the second appeal, the Court enforced that rule, but in part only. Therefore, it did not give to the final judgment of the Pennsylvania Court the full faith and credit guaranteed by the Constitution of the United States.

The decision of the Supreme Court of Florida is in conflict with the decisions of this court relative to the full faith and credit clause of the Federal Constitution and particularly is it in conflict with the recent decision of this Court in the case of Sutton v. Leib, No. 143 October term, 1951, reported in 342 U. S. 402; 72 S. Ct. 98, wherein this court held that a state court must give the same force and effect to the decrees of a court of a sister state as is accorded those decrees by the court in the state where rendered.

It is contended that the decree of the Supreme Court of Florida is in conflict with the recent decisions of this Court with respect to the effect to be given a final judgment of a state court under the full faith and credit clause in actions for divorce.

7. This petition for certiorari is filed in accordance with the United States Code Title 28, Section 2101, which provides, inter alia, as follows:

"(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. • • • • •

"The running of the time within which proceedings may be initiated here to bring up judgment or decrees for review is suspended by the seasonable filing of a petition for rehearing." Gypsy Oil Company v. Escol, 275 U. S. 498, 72 L. Ed. 393.

It begins to run from the date of denial of such petition.

The petition for rehearing was denied May 21, 1952 (R 803).

8. The Federal questions raised in this case were raised by the petitioner, who continued to raise those questions throughout the trial in the Florida case.

QUESTIONS PRESENTED

1. Where wife files applicaion for divorce in Pennsylvania Court on the ground of indignities to her person, and after full hearing, at which wife had ample opportunity to be heard but did not attend, Pennsylvania Court enters

a final decree holding that wife had failed to support her claim and therefore, her action was dismissed at her cost, is that final judgment of the Pennsylvania Court res adjudicata in a divorce action filed in Florida after the Pennsylvania action had been filed, when the facts as to the conduct of the husband are substantially the same as the wife would have been required to prove in Pennsylvania to sustain her action for divorce?

2. In such case, where the Pennsylvania Court found, after hearing and upon competent testimony, that the wife was a resident of Pennsylvania and was not domiciled in Florida when her Florida action was filed, is that finding of the Pennsylvania Court conclusive in the subsequent action for divorce in Florida, under the full faith and credit clause of the Constitution of the United States?

3. Where the character of testimony relied upon by a wife to justify her in leaving her husband under the laws of Florida is substantially the same as that required to establish her charge of indignities to her person in a Pennsylvania Court, may the Florida Court retry the issues as to the conduct of her husband, and grant the wife a divorce on the ground of constructive desertion in an action instituted in Florida, after the wife's prior divorce action in Pennsylvania on the charge of indignities to the person has been dismissed for lack of the proof required to maintain her action in Pennsylvania?

4. Is a final judgment of a Pennsylvania Court, denying a wife a divorce on the ground of indignities to the person, conclusive as to all questions of fact essential to and litigated in the Pennsylvania Court, so that the wife is barred from obtaining a divorce in a subsequent action in Florida upon the ground of constructive desertion, based upon the same conduct of the husband as was adjudicated in the Pennsylvania action?

5. Where wife applies for divorce upon the ground of indignities to the person in a Pennsylvania Court, and that Court dismisses her action for failure of proof, and there is no general rule as to the degree of proof required to sustain an action for divorce on the ground of indignities to the person under Pennsylvania law, may the Florida Court subsequently grant a divorce to the wife on the ground of constructive desertion, where the conduct of the husband relied upon as the cause for the wife leaving her husband, is the same conduct as was passed upon in the Pennsylvania case?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The Supreme Court of Florida has decided important questions arising under the Constitution of the United States of America and involving full faith and credit. It is contended that is has decided those questions in a way probably untenable and in conflict with the applicable decisions of this Court in the cases decided by this Court with respect to the full faith and credit which must be accorded a final judgment of a State court by courts of sister states in cases involving the granting of a divorce.

The cases referred to are COOK V. COOK, 342 U. S. 126; 72 S. Ct. 157, and SUTTON V. LEIB, 342 U. S. 402; 72 S. Ct. 398, together with other cases therein referred to and particularly in the notations appearing in the report of the last mentioned case. Reference is made also to the report of the case of GORDON V. GORDON, 160 Fla. 838, 36 So. 2d 774, as reported in 4 A.L.R. 2d 102, with annotations in the same volume beginning at page 107.

There are many decisions of your Honorable Co holding that where a state court grants a decree of divorce which compiles with all the laws of the state court granting the decree, that decree in divorce must be given the same full faith and credit in every other state as it is entitled to in the state in which it is granted. Diligent search has disclosed no reported case decided by your Honorable Court setting forth the rule which must apply to the Courts of all States where a final judgment of a state court is entered denying a divorce application. For the sake of uniformity throughout the United States, the writ of certiorari should be allowed in this case so that a definite rule may be announced by your Honorable Court with relation to the full faith and credit which must be accorded a final judgment of a state court denying a divorce.

This case involves questions of great public importance involving martial status ,and the full faith and credit clause, where judgments of two state courts are involved. These matters of family status, marriage and divorce are of the greatest importance. We believe that there is no prior decision of this Court stating specifically that where a state court has entered a final judgment denying a divorce in a case complying with all the laws of that state, that final judgment denying the divorce, is entitled to the same full faith and credit in every other state as it is entitled to in the state denying the divorce.

It is contended that the Florida Courts have decided a federal question of substance in a manner not in accord with applicable decisions of Your Honorable Court. The grounds upon which the writ of certiorari is sought are substantial, because there may be many cases involving the marital relationship of many persons, in which full faith and credit may be denied a final judgment of a state court, by courts of other states relying upon the judgment of the Supreme Court of Florida in this case. The question as to whether one state has, or has not, accorded to the final

judgment of the courts of a sister state the full faith and credit guaranteed by the Constitution, and laws of the United States, and the judical decisions of Your Honorable Court, is also substantial because it involves constitutional rights.

Your Honorable Court has held that full faith and credit must be given to divorce decrees rendered in contested cases by courts in sister states, even though doing so may conflict with local policy, because that is part of the price we pay for our constitutional guarantees.

The questions presented in this case are substantial because they seriously affect the parties and their constitutional rights. Under the final judgment of the Pennsylvania Court the marital status of the parties hereto was not changed. Under the decree of the Florida Courts, the parties are no longer man and wife. Under the final judgment of the Pennsylvania Court, the respondent was a resident of Pennsylvania from 1941 until May 27, 1947. Under the decree of the Florida Courts, the respondent was a resident of Florida for at least 90 days before September 30, 1946. Those inconsistent judgments detrimentally affect the constitutional rights of the parties to this case.

The federal purpose of the full faith and credit clause of our constitution makes Your Honorable Court, for both state and federal courts, the final authority when a question is raised as to what is the permissible limit of the full faith and credit clause, and therefore, petitioner's constitutional rights should not be denied him by a decree of a state court defining the permissible limits of that clause.

The denial to petitioner of his constitutional rights to avoid relitigation of matters finally determined by one state court constitutes a substantial reason to allow a writ of certiorari in this case. Your Honorable Court has held that where a state court has determined the question of residence between parties, any attempt of a sister state to

redetermine that question of residence is void, and full faith and credit should be accorded the state which first determined that question of residence.

We respectfully represent that the Supreme Court of Florida has failed to give to the final judgment of the Pennsylvania Court, denying a divorce to the wife, the full faith and credit which should be accorded to that Pennsylvania decree. Since there is no prior decision of this Court relative to the full faith and credit which must be given in all the states to a final decree of a state court denying a divorce, the petition for certiorari should be granted so that a uniform rule may be obtained with reference to such final judgments of state courts denying divorce applications, as distinguished from those where the state courts have granted divorces.

We believe that a decree of this Court in the instant case will remove the lack of uniformity relative to the full faith and credit which must be given the final judgments of state courts in divorce actions. That there is a lack of uniformity with respect to the questions presented in the instant case is clearly shown by the opinion of the Supreme Court of Florida, from which we quote as follows (R 773): "Apparently some lawyers and text book authors believe there is confusion in the law of this jurisdiction upon the question, under what circumstances does the doctrine of res adjudicata or the principal of estoppel by judgment become operative. In all probability the confusion which apparently exists stems from a failure clearly to comprehend the difference between the doctrine of res adjudicata and estoppel by judgment and to understand the (R 774) test proper to be applied in determining which, or whether either, may be appropriately invoked. Estoppel by judgment has its counterparts or at least its quasi counterparts, in "estoppel by verdict" and "conclusiveness of verdict." Either res adjudicata or estoppel by judgment furnishes the primary test in determining the applicability of the full

faith and credit clause of the Federal Constitution. This Court has at least indicated that full faith and credit need not be given to a final decree of a sister state when estoppel by judgment is the appropriate test unless the "precise facts" offered by the plaintiff in the Florida action were heard and determined in the former suit which was adjudicated in the foreign jurisdiction. See Bagwell v. Bagwell, 153 Fla. 471, 14 So. 2d 841.

The adjudications in other jurisdictions which we have considered in connection with this case lead us to the conclusion that there is an absence of uniformity with respect to the test which should be employed to determine whether a final decree or judgment of a foreign jurisdiction should be accorded full faith and credit in a subsequent action be between the same parties.* Some courts hold, so we believe, as we held in Gordon v. Gordon, supra, that is to say that the determining factor in deciding whether the cause of action asserted in the first suit was the same as that relied upon in the second suit, is whether the evidence necessary to sustain the latter action was essentially the same as that which was given or would have been required had the complaining party testified in the prior suit. Buder v. Fiske, 174 F. 2d 260; Griggs v. Griggs, 214 S. C. 177, 51 S. E. 2d 622; Whelan v Connolly, 80 N. Y. S. 2d 691; Band v. Reinke, 230 Iowa 515, 298 N. W. 865; Jackson v. Pepper Gasoline Co., 284 Ky. 175, 144 S. W. 2d 212. See also 4 A.L.R. 2d 107 et seq. Other courts are of the opinion that full faith and credit should be given and that a final decree of a court of competent jurisdiction of a sister state should operate as a bar to a subsequent action as to all matters which were or (R 775) might have been litigated orginally. Ashton v. Ashton, 192 Ark. 774, 94 S. W. 2d 1033; Bowen v. Bowen, 219 Iowa 550, 258 N. W. 832; Ball v. Ball, 189 Ark. 975, 76 S. W. 2d 71; 27 C.J.S., Divorce, Sec. 326, page 1271; 4 A.L.R. 2d 114.

* Blackface supplied.

We have held as a general proposition that when a final decree or judgment of a court of competent jurisdiction becomes absolute it puts at rest and entombs in eternal quiescence every justiciable, as well as every actually adjudicated, issue. This pronouncement is considered by us as controlling only when res adjudicata is the proper test. By this we mean it is not controlling except in an instance wherein the second suit is between the same parties and is predicated upon the same cause of action as was the first. If the second suit is bottomed upon a different cause of action than that alleged in the prior case estoppel by judgment comes into play and only those matters actually litigated and determined in the initial action are forclosed—not other matters which "might have been but were not litigated or decided." Prall v. Prall, 58 Fla. 496, 50 So. 867, 26 L.R.A. (N.S.) 577; Bagwell v. Bagwell, supra. The test proper to be applied in a divorce action in order to decide whether the second suit is founded upon a new and separate cause of action is not simple whether a different statutory ground for divorce is asserted but whether the facts necessary to the maintenance of such suit are essentially the same as those which were relied upon to establish plaintiff's alleged right to a decree in the first action and whether the decree or judgment sought in each required the same degree of proof to justify or sustain it. If the degree of proof required in the first suit is greater than that required in the second the cause of action cannot be held to be the same and estoppel by judgment is the proper test to be applied.

(R 776) A great many courts and text book writers treat "res adjudicata" and "estoppel by judgment" as synonymous. The most erudite legal minds appear to have difficulty in stating the difference which they consider exists between them. We find no occasion to discuss the slight difference which some authors limn between the terms "estoppel by judgment", "estoppel by verdict" or "conclusiveness of verdict". These expressions are oft times used interchangeably. Although dissertations have come to our attention in which the doctrine of res adjudicata is considered as a sub-division or branch of the law of estop-

pel, strictly and technically speaking, such treatment is not proper. The former is founded upon the sound proposition that there should be an end to litigation and that in the interest of the State every justiciable controversy should be settled in one action in order that the courts and the parties will not be pothered for the same cause by interminable litigation. On the other hand, estoppel rests upon equitable principles. 50 C.J.S., Judgments, Sec. 593. Even so, the ultimate purpose of estoppel by judgment is to bring litigation to an end. The difference which we consider exists between res adjudicata and estoppel by judgment is that under res adjudicata a final decree or judgment bars a subsequent suit between the same parties based upon the same cause of action and is conclusive as to all matters germane thereto that were or could have been raised, while the principle of estoppel by judgment is applicable where the two causes of action are different, in which case the judgment in the first suit only estops the parties from litigating in the second suit issues—that is to say points and questions—common to both causes of action and which were actually adjudicated in the prior litigation." (R 776).

Wherefore it is respectfully submitted that this petition for writ of certiorari to review the judgment and decree of the Supreme Court of Florida filed in this proceeding on May 2, 1952 should be granted.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

I.

OPINION OF THE COURT BELOW

This case was in the Supreme Court of Florida twice. The citation of the opinion of the Supreme Court of Florida on the first appeal is 160 Fla. 838, 36 So. 2d 774, ~~3d 102~~. The opinion appears in the record in this case, pages ~~7~~ 8 to ~~7~~ 13 inclusive.

The opinion of the Court sought to be reviewed was filed May 2, 1952, and is reported in 59 So. 2d, at page 40. The opinion appears in the record in this case, pages 770 to 787 inclusive.

II.

STATEMENT OF FACTS

We respectfully submit that the facts to be considered in this case are set forth fully in the petition under the heading of "Summary Statement of the Facts". (Petition, page 1 et. seq.)

III.

ASSIGNMENTS OF ERROR

1. The Supreme Court of Florida erred in failing to give full faith and credit to the final decree of the Pennsylvania Court by which the Pennsylvania Court had found that respondent was a resident of Pennsylvania and that she was not domiciled in Florida when her Florida action was filed.

2. The Supreme Court of Florida erred in failing to give full faith and credit to the final decree of the Pennsylvania Court by granting respondent a divorce on the ground of constructive desertion when the character of the testimony relied upon to justify respondent in leaving her husband was essentially the same as she would have been required to present in the Pennsylvania Court to establish her charge of indignities to the person.

3. The Supreme Court of Florida erred in failing to hold that the final judgment of the Pennsylvania Court, by which a divorce was denied, was res judicata in the action for divorce between the same parties in the Florida Courts.

4. The Florida Court erred in holding that the degree of proof required under the laws of the State of Florida to justify a wife in temporary leaving her husband was less than the degree of proof required to sustain a divorce on the ground of indignities to the person under the Pennsylvania law because there is no general rule in Pennsylvania as to the degree of proof required in such case.

5. The Supreme Court of Florida erred in failing to hold that the final judgment of the Pennsylvania Court, being entitled to full faith and credit, was conclusive as to all questions of fact essential to and litigated in the Pennsylvania action, and in failing to hold that the final judgment of that Court conclusively established the fact that petitioner's conduct was not such as to justify respondent in leaving him, but that respondent had, in fact, deserted petitioner.

6. The Florida Court erred in failing to give to the final judgment of the Pennsylvania Court the full faith and credit to which it was entitled in Pennsylvania, as reuired by the Constitution and laws of the United States and the judical decisions of Your Honorable Court.

IV.

PROPOSITIONS OF LAW

Petitioner contends that all factual issues as to domicile and residence of the respondent and the petitioner, and all other matters bearing upon jurisdiction, must be considered as forclosed by the final decree of the Pennsylvania Court since both parties to the divorce appeared in that Court and thereby became subject to its final decree. In support of this proposition, we cite: WILLIAMS V. NORTH CAROLINA, 325, U. S. 226, 65 S. Ct. 1092, 89 L. Ed. 1577; SHERRER V. SHERRER, 334 U. S. 343, 68 S. Ct. 1087, 92 L. Ed. 1429; COOK V. COOK, 342, U. S. 126, 72 S. Ct. 157 SUTTON V. LEIB, 342 U. S. 402, 72 S. Ct. 398.

Petitioner respectufully submits that under the decisions of Your Honorable Court, the full faith and credit clause of the Federal Constitution demands that the courts of each state give to a final decree of another state full faith and credit by barring either party to a divorce acion, who has been personally served, or who has entered a personal appearance, from collaterally attacking the decree of the court, in a state other than that in which it was entered. We believe that this proposition is sustained by the decisions of Your Honorable Court above mentioned, and also in the SECOND WILLIAMS CASE, 325 U. S. 226, S. Ct. 1092, at 1095, 89 L. Ed. 1577, and in the case of JOHNSON V. MULLBERGER, 340 U. S. 581, 71 S. Ct. 474, 95 L. Ed. 411.

The propositions relied upon by the petitioner are:

1. A final decree of divorce, granted by a state court, where the parties have appeared, is entitled to full faith and credit in every state of the Union. Likewise, we contend that a final decree of a state court, denying a wife a divorce, is entitled to full faith and credit in every state of the

Union, and is conclusive upon all parties who appeared, as to the questions of domicile, good faith and conduct litigated in the action wherein the divorce was refused. In this case, the wife herself selected the Pennsylvania Court for the trial of the Pennsylvania action and therefore she was bound by the final decree of that Court.

2. There is no general rule as to the degree of proof required to sustain a divorce in Pennsylvania upon the ground of indignities to the person. Therefore the Supreme Court of Florida could not legally assume that there was a general rule in Pennsylvania, setting forth the degree of proof required in that state, and thus compare that rule with a rule in Florida justifying a wife in leaving her husband. The decision of the Supreme Court of Florida is based upon the assumption that the Florida courts demand less proof of mis-conduct to justify a wife in leaving her husband than do the Pennsylvania Courts to justify a wife in obtaining a divorce on the ground of indignities to the person. Since there is no rule in Pennsylvania by which the degree of proof could be measured, the reason given by the Supreme Court of Florida for its decree is not sound and, therefore, the proceeding in the Supreme Court of Florida should be reviewed by your Honorable Court and its final decree reversed.

3. To permit the decree of the Supreme Court of Florida to stand, results in a situation which should not be permitted. Under the final decree of the Pennsylvania Court, the marital status of these parties was not changed. The wife failed to sustain the burden of proving that her husband's conduct entitled her to a divorce on the grounds of indignities to her person. In that Court the proof was that the conduct of the husband could not have caused the wife to leave the husband, but on the contrary, it was shown that the wife deserted the husband. Under the final decree in the Florida case the same conduct was held to justify the wife in leaving her husband, and it was held

the wife had not deserted her husband, but on the contrary, the husband was guilty of constructive desertion of his wife.

4. Under the final judgment of the Pennsylvania Court it was determined that the wife, who was the plaintiff in the action, was a resident of, and domiciled in Pennsylvania from 1941 until 1947, and that she was not domiciled in Florida during any of that time. If that decision is given full faith and credit, then the wife could not possibly have been a resident of Florida for 90 days before she filed her action in the Florida Court on September 30, 1946.

V.

CONCLUSION

We respectfully submit that this case presents substantial and serious legal questions involving the final decrees of two states of the United States, which decrees are inconsistent. We contend further that the decree of the Supreme Court of Florida has denied to the final judgment of the Pennsylvania Court the full faith and credit demanded by the Constitution of the United States.

We believe that the propositions stated are supported by many decisions of your Honorable Court, many of which are set forth in the opinion, and in the notes of the report of the opinion, of your Honorable Court in the case of SUTTON V. LEIB, 342 U. S. 402, 72 S. Ct. 398. Also in those decisions set forth in the Annotations of the instant case as it first appeared in the Supreme Court of Florida, as set forth in 4 A.L.R. 2d at page 102 and 107 et seq.

Wherefore, we respectfully pray your Honorable Court to grant a writ of certiorari so that the judgment of the Supreme Court of Florida may be reviewed.

Respectfully submitted,

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No. 224. GOOD ET AL. *v.* DOW CHEMICAL CO. Appeal from the Court of Civil Appeals of Texas. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of jurisdiction. 28 U. S. C. § 1257 (2). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by

28 U. S. C. § 2103, certiorari is denied. *Hayden C. Covington* for appellants. *W. S. Elkins* and *Leroy Jeffers* for appellee. Reported below: 247 S. W. 2d 608.